No. 418

In The

Supreme Court of the United States

OCTOBER TERM, 1968

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama
PETITIONER

VS.

WILLIAM S. RICE,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MacDONALD GALLION
Attorney General of Alabama

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama

ATTORNEYS FOR PETITIONER
Administrative Building
Montgomery, Alabama 36104

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CITATIONS

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Curtis M. Simpson, as Warden of Kilby Prison, Montgomery, Alabama, by and through the Attorney General of the State of Alabama, MacDonald Gallion, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 30, 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the United States District Court for the Middle District of Alabama granting the petition for writ of habeas corpus is dated May 30, 1968, and is unreported to date. This opinion and the judgment thereon is printed in Appendix A and A-1 hereto, infra, pp. 12-14.

The opinion of the United States District Court for the Middle District of Alabama granting the respondent's motion to file a forma pauperis his application for a writ of habeas corpus, dated July 17, 1967, is reported as *Rice v. Simpson*, 271 F. Supp, 267, and is printed in Appendix B hereto, infra, pp. 15-18.

The opinion of the United States District Court for the Middle District of Alabama granting the writ of habeas corpus is dated September 26, 1967, is reported as *Rice v. Simpson*, 274 F. Supp. 116, and is printed in Appendix C hereto, infra, pp. 19-32.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on May 30, 1968 (R. p. 150, p. 14, infra. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I

Whether a State court may increase punishment following a new trial on a plea of not guilty where the first sentence imposed on a plea of guilty is vacated on the prisoner's contention that he was denied counsel at the first trial.

II

Whether, under the Fourteenth Amendment to the Constitution of the United States and under the facts and circumstances of this case, it was constitutionally permissible to deny to the respondent credit on subsequent valid sentences for time served on a prior void judgment.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States.

STATEMENT

The respondent, William S. Rice, filed in forma pauperis his application for writ of habeas corpus in the United States District Court for the Middle District of Alabama. (R. p. 5.). He alleged that in the Circuit Court of Pike County, Alabama, in February 1962, upon pleas of guilty in four separate criminal cases, he was sentenced to a total of ten (10) years in the State penitentiary. He further alleged that in August, 1964, the judgments and sentences in these cases were set aside by said State court after a hearing upon his application for writ of error coram nobis. The basis for this action was that the respondent was not represented by counsel at the time he entered his pleas of guilty in 1962. The respondent also alleged that in December, 1964, he was retried in Case No. 6427, and in Case No. 6428, and was sentenced to a term of ten (10) years in each case. He also stated that in May, 1965, he was convicted in Case No. 6430, and sentenced to a term of five (5) years. Case No. 6429 was nol prossed on the motion of the State Solicitor in May, 1965.

The respondent contended that the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on one of his original sentences and that the sentences resulting in his present incarceration violated his constitutional rights in that said sentences constitute punishment for

his having exercised his right and having been successful in a State post-conviction proceeding. The respondent contended that it is not constitutionally permissible for the State of Alabama to deny him credit for time served on his void sentence, and that a State trial court may not constitutionally impose sentences greater than those imposed upon his first trial.

The United State. District Court allowed the filing of the application for writ of habeas corpus and denied the petitioner's motion to dismiss. (R. p. 56.)

After a hearing on the merits of the case (R. pp. 79-143) said District Court held that the State of Alabama must give the respondent credit for the time he served upon the void sentence imposed in February, 1962, in Case No. 6427. Said Court also held that the maximum time which could constitutionally be imposed by the Circuit Court of Pike County, Alabama, upon the respondent was four (4) years in Case No. 6427, two (2) years in Case No. 6428, and two (2) years in Case No. 6430. The Court also ordered that under its calculation the excess time which had been served in Case No. 6427 to the date of the Court's order must be credited to Case No. 6428 and Case No. 6430. (R. pp. 57 - 73.)

The effect of the order of said District Court was that the respondent had finished serving his sentence in Case No. 6427 and that he must be given credit for excess time served, as such time was calculated by the Court, toward the sentences in Cases No. 6428 and 6430.

Curtis M. Simpson, as Warden of Kilby Prison, Montgomery, Alabama, took an appeal to the United States Court of Appeals for the Fifth Circuit (R. p. 74) and on May 30, 1968, said Circuit Court of Appeals affirmed the order and judgment of the United States District Court for the Middle District of Alabama. (See Appendix A hereto, infra, pp. 12-13).

REASONS FOR GRANTING THE WRIT

The United States Circuit Courts of Appeals have rendered conflicting opinions in regard to the two questions presented by this petition. Both of these questions are of great importance to the States.

I.

The first question presented is whether, under the facts of the case at bar, a State trial court can constitutionally subject a person to a more severe punishment upon his second conviction under an indictment than was imposed upon him on his first conviction under such indictment.

The United States Courts of Appeals for the Third and Seventh Circuits have held that a state may impose upon one convicted at a new trial of the same crime of which he was previously convicted a more severe sentence than was imposed upon his earlier conviction.

In the case of *United States v. Russell*, 378 F. 2d 808 (3rd Cir. 1967) the Court considered an appeal from a habeas corpus proceeding, the facts of which are strikingly similar to the case at bar. It was there held that imposing a greater sentence on fewer counts after a new trial of the case before a jury than was given the petitioner on his plea of guilty at his first trial did not violate constitutional standards of due process. The Court said, in part, as follows:

> "While we are wholeheartedly in agreement with the principles laid down in Gideon v Wainwright, * * *, it must be conceded that only the fact of not being represented by counsel in the pre-court proceedings gave him the second opportunity to plead his case and he chose to go to trial and have a jury test the accusations against him. When he appeared and entered a plea of not guilty at the second trial,

the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered."

In the case of *United States v. White*, 382 F. 2d 445 (7th Cir. 1967), the Court held that different punishments may be imposed upon reconviction of the same crime following a successful appeal when the punishment results from the judge's exercise of his judicial discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

Recent cases holding to the contrary include *Patton v. North Carolina*, 381 F. 2d 636 (4th Cir. 1967), and *Marano v. United States*, 374 F. 2d 583 (1st Cir. 1967).

The following cases support, either expressly or by implication the view that a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed should he again be convicted of the same crime under the same indictment:

ROBINSON V. UNITED STATES,
144 F. 2d 392 (6th Cir.)
Cert. Den. 324 U. S. 282,
89 L. Ed. 629, 65 S. Ct. 666;

HOBBS V. STATE,
231 Md. 533, 191 A. 2d 238,
Cert. Den. 375 U. S. 914,
11 L. Ed. 2d 153, 84 S. Ct. 212;

HICKS V. COMMONWEALTH,
345 Mass. 89, 195 N. E. 2d 739,
Cert. Den. 374 U. S. 839,
10 L. Ed. 2d 1060, 83 S. Ct. 1891;

STATE V. WHITE,
262 N. C. 52, 136 S. E. 2d 205,
Cert. Den. 379 U. S. 1005,
13 L. Ed. 2d 707, 85 S. Ct. 726.

This Honorable Court held in *Stroud v. United States,* 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50, that a prisoner's constitutional rights were not violated when he was convicted of first degree murder with the death penalty after reversal of a first conviction of the same degree but with a life sentence. This is the only case in which this Honorable Court has heretofore written to the question involved.

Sentences totaling five years more of imprisonment than were imposed upon the first trial for armed robbery were affirmed in *Hobbs v. State,* supra. The Court in this case rejected the contention that the imposition of new sentences in the second trial, resulting in a greater period of confinement, were unlawful. The Court declared that ordinarily any punishment authorized by statute and within the statutory limits was not cruel and unusual, and held that in asking for and receiving a new trial a defendant must accept the hazards as well as the benefits resulting therefrom.

Courts have recognized that pleas of guilty are the result of a bargain or agreement with the prosecutor and that a guilty defendant must always weigh the possibility of receiving a more severe sentence on a plea of not guilty than he will receive as a result of an agreement with the prosecutor for a lighter sentence.

In Alabama maximum sentences which may be imposed upon persons convicted of crime are fixed by statutes. The effect of the judgment of the court below in the case at bar is to reduce this statutory maximum as to the respondent. If said judgment is allowed to stand the trial courts of the State of Alabama will not be allowed to impose maximum sentences upon convictions after pleas of not guilty in cases

in which the accused has been previously sentenced to short terms upon pleas of guilty.

The judgment below approves the finding of the District Court that no justification is shown in the case at bar for more severe punishment after reconviction. It is respectfully submitted that the petitioner should not have been required to show any fact other than the fact that the first conviction was on a plea of guilty and the second conviction was imposed only after a trial on a plea of not guilty. One accused of crime is in many instances given a lighter sentence when he enters a plea of guilty than when he is convicted after insisting that he is not guilty. It is our contention that this is a healthy situation from the standpoint of the accused as well as from the standpoint of society. See *United States v. Russell*, supra.

While we recognize that some courts hold a more severe punishment on a second trial to be unconstitutional, this Honorable Court has never so held and we respectfully submit that the better and more just reasoning is found in those cases which hold that a new trial bears no relationship to a previous plea of guilty and begins with the slate wiped clean.

II.

The opinion of the court below, found in Appendix A hereto, infra, which adopts the opinion of the District Court for the Middle District of Alabama, found in Appendix C, hereto, infra, held that it is not constitutionally permissible for the State of Alabama to deny to the respondent credit for time served on a void judgment to be applied to sentences imposed by subsequent valid judgments. Said opinion of the court below is in direct conflict with the case of *Newman v. Rodriguez*, 375 F. 2d 712 (10th Cir. 1967).

In Alabama a State prisoner is given credit for time served on a void sentence when there is another valid sentence pending against him during the period such time is served.

Hill v. Holman, 255 F. Supp. 924. See also *Youst v. United States,* 151 F. 2d 666 (5th Cir. 1945). These cases should not control the case at bar.

In the case of *Hill v. Holman,* supra, which was decided by the same United States District Court before which the case at bar was originated, a writ of habeas corpus was granted and a State prisoner was held entitled to his immediate release. The opinion of said District Court in that case was very broad and the dictum found therein would control the case at bar if the facts of the two cases were identical. However, such facts were not identical since the prisoner involved in the case of *Hill v. Holman,* supra, had actually served the time imposed upon him under all his valid sentences at the time of his release.

The case of *Youst v. United States,* supra, does not control the case at bar since the opinion in that case applied credit for time served under a void judgment to a valid sentence which existed during the period such time was served.

The case of *Hill v. Holman,* supra, cites *Hoffman v. United States,* 244 F. 2d 378 (9th Cir. 1957). The *Hoffman* case recognizes the principle that time served should be applied to existing valid sentences, however, the prisoner in said case was not released because he had not been incarcerated for a time equal to his sentences under admittedly valid judgments.

As pointed out hereinabove the judgment of the court below is in direct conflict with the case of *Newman v. Rodriguez,* supra, which held that the denial to a State prisoner of credit for time served on a void judgment was constitutionally permissible. The facts of that case are similar to the facts in the case at bar. In the case at bar as well as the *Newman Case* there was no valid judgment pending against the prisoner at the time his conviction was declared to

be void. Cf. *Meyers v. Hunter*, 160 F. 2d 344 (8th Cir. 1947); Cert. Den. 331 U.S. 852, 91 L.Ed. 1860, 67 S. Ct. 1730.

In footnote 6 to the order of the District Court in the case at bar (Appendix C, infra), the Court recognizes that its holding is in conflict with the opinion rendered in the case of *Newman v. Rodriguez*, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MacDONALD GALLION
Attorney General of Alabama

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama
Counsel For Petitioner

CERTIFICATE

I, Paul T. Gish, Jr., one of the attorneys for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of August 1968, I served two copies of the foregoing petition for writ of certiorari on the respondent and on one of his attorneys of record, by mailing such copies in a duly addressed envelope, to the respondent and to the attorney as follows:

To: Mr. William S. Rice
Kilby Prison
Route 3, Box 115
Montgomery, Alabama

To: Honorable Oakley W. Melton, Jr.

Attorney at Law
Steiner, Crum and Baker
1109-25 First National Bank Building
Montgomery, Alabama 36101

PAUL T. GISH, JR.

Assistant Attorney General
of Alabama
Administrative Building
Montgomery, Alabama 36104

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25412

CURTIS M. SIMPSON, Warden, Kilby Prison, Montgomery, Alabama,

Appellant,

versus

WILLIAM S. RICE,

Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

(May 30, 1968.)

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge.

TUTTLE, Circuit Judge: William S. Rice in February, 1962, entered pleas of guilty in four separate criminal cases in the Circuit Court of Pike County, Alabama. He was sentenced to a total of ten years in the state penitentiary, the term consisting of four separate sentences, the first for four years and the remaining three for two years each. In August, 1964, the judgments and sentences in these cases were set aside by the Circuit Court of Pike County in a corum nobis proceeding on the ground that appellee was not represented by counsel at the time of his original pleas.

The petition for habeas corpus to the District Court alleged that the appellee was retried in three of the four cases at which time the same trial court sentenced him to a total of twenty-five years, the term consisting of a sentence of ten years on each of the first two charges and five years on the third. The fourth charge was dismissed because of the absence of a witness. Rice attacked these subsequent sentences to the extent that they exceeded the original sentences on the original pleas of guilty and to the extent that they did not also give him credit for the time served under the vacated sentences.

The trial court overruled the State's motion to dismiss the petition for failure to exhaust state remedies, there being at the time of the hearing no adequate state procedure which the appellee was required to pursue. Although an intervening decision by the Court of Appeals of Alabama, *Goolsby v. State*, Sixth Division 202 (not reported) might have some bearing on the merits of this case, under the principles of *Fay v. Noia*, 372 U. S. 391, we should not remand the case to require the appellee to pursue a state remedy at this stage of the proceedings.

The District Court entered a judgment granting the relief sought by the appellee. It would be useless for us to add to the reasoning or conclusions announced by the trial court whose opinion may be found at 271 F. Supp. 267. We, therefore, affirm the judgment of the trial court on the basis of Judge Johnson's opinion which is adopted as the opinion of this court.

The judgment is AFFIRMED.

(Note: The citation found in the last paragraph of this opinion should be 274 F. Supp. 116. The order of the District Court granting the respondent permission to file his petition in forma pauperis is reported at 271 F. Supp. 267.)

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25412

D. C. Docket No. CA 2583-N

CURTIS M. SIMPSON, Warden, Kilby Prison, Montgomery, Alabama,

Appellant,

versus

WILLIAM S. RICE,

Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before TUTTLE and DYER, Circuit Judges and MEHRTENS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 30, 1968

Issued as Mandate: June 21, 1968

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

William S. Rice, Petitioner,	)	
vs.	)	
Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama,	)	Civil Action No. 2583-N
Respondent.	)	

ORDER

Petitioner now presents to this Court his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County, Alabama, in February 1962, upon his pleas of guilty in state court criminal cases Nos. 6427, 6428 and 6429, he was sentenced by said state court to an aggregate of eight years in the state penitentiary. Petitioner alleges, further, that in August 1964 his pleas, and the judgment and sentence thereon in each of said state court cases, were set aside upon his application, and the proof offered in support thereof, for the writ of error coram nobis. The petition now presented to this Court further avers that in December 1964 he was retried and, upon conviction in the same circuit court, was sentenced to a term of ten years in case No. 6427, ten years in case No. 6428, and in May 1965, after a conviction, was sentenced to a term of five years in case No. 6429. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted, now aggregate twenty-five years.

Petitioner alleges that, in resentencing him, the Circuit Court of Pike County failed to give him credit for prior time served on the original sentences, and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965, which sentences aggregate over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised and been successful in his post-conviction coram nobis proceeding. Petitioner alleges that it is constitutionally impermissible for the State of Alabama to force upon him the risk (here, a reality) of more severe punishment as a penalty for his having exercised and been successful in Alabama post-conviction proceedings.

Petitioner very candidly admits that he has not presented this issue to the courts of the State of Alabama since he was reconvicted and resentenced by the Circuit Court of Pike County, Alabama, in December 1964 and May 1965. He argues, instead, that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes in his case.

Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded no post-conviction remedies by the State of Alabama where his only contentions; in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction proceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in *Aaron v. State*, 192 So. 2d 456 (Nov. 29, 1966) wrote:

> "Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. Isbell v. State, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that our remedy of coram nobis automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See Wilson, Federal Habeas Corpus and the State Court Criminal Defendant, 19 Vand. L. Rev. 741."

And, again, the same Judge, speaking for the same court, in March 1967 in *Ex Parte Merkes*, reiterated the above-quoted statement from the *Aaron* case and stated further, "We see no reason to go into what should be the rule of credit for prior time until we have to."

The above cases, appearing to represent the law of the State of Alabama upon the questions now presented in petitioner's application, make it apparent that Title 28, §2254 of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that the motion of William S. Rice, presented to this Court on July 13, 1967, seeking leave to file his application for a writ of habeas corpus in forma pauperis, be and the same is hereby granted. The clerk of this Court is ORDERED and DIRECTED to file without the prepayment of fees and costs the petition for a writ of habeas corpus now presented to this Court by William S. Rice.

It is the further ORDER, JUDGMENT and DECREE of this Court that Curtis M. Simpson, Warden of Kilby Prison, Montgomery, Alabama, and/or any other appropriate official

acting for or in behalf of the State of Alabama, on or before August 4, 1967, show cause, if any there be, why this Court should not issue the writ of habea corpus as herein prayed for by the petitioner, William S. Rice.

It is further ORDERED that the Honorable Oakley W. Melton, Jr., of Montgomery, Alabama, be and he is hereby appointed to represent William S. Rice in this action.

It is further ORDERED that a copy of this order be served upon the said Curtis M. Simpson as Warden of Kilby Prison and that copies be mailed by certified mail to the Honorable MacDonald Gallion, Attorney General, State of Alabama, Montgomery, Alabama, to the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, and to the petitioner, William S. Rice, in care of the Warden of Kilby Prison, Montgomery, Alabama.

Done, this the 17th day of July, 1967.

Frank M. Johnson Jr.

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

William S. Rice, Petitioner, vs. Curtis M. Simpson, Warden, Kilby Prison, Montgomery, Alabama, Respondent.	Civil Action No. 2583-N

ORDER

The petitioner, William S. Rice, by leave of this Court, files in forma pauperis his application for a writ of habeas corpus. He alleges that in the Circuit Court of Pike County in February 1962, upon pleas of guilty in four separate state court criminal cases, he was sentenced to an aggregate of ten years in the state penitentiary.[1] Petitioner alleges, further, that in August 1964, his pleas and the judgment and sentence thereon in each of said state court cases were set aside by the Circuit Court of Pike County, Alabama, upon his application for a writ of error coram nobis and the proof offered in support thereof. The basis for the state court's action was that petitioner was not represented by counsel as constitutionally required by *Gideon v. Wainwright*, 372 U. S. 335. The petition now presented avers that in December 1964 he was retried in state cases Nos. 6427 and 6428, and upon conviction in the

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[1] In case No. 6427, he was sentenced to four years and in cases Nos. 6428, 6429 and 6430, he was sentenced to two years in each case; the sentences were to be served consecutively.

same circuit court, before the same circuit judge, he was sentenced to a term of ten years in No. 6427 and ten years in No. 6428. Petitioner further alleges that in May 1965 in case No. 6430, after conviction, he was sentenced to a term of five years. Case No. 6429 was nol-prossed on motion of the state solicitor in May 1965. Thus, the sentences, after petitioner was successful in his coram nobis proceeding and after he was retried and convicted in these second degree burglary cases—which, by statute in Alabama, carry a maximum sentence of ten years each[2]—now aggregate twenty-five years.

Petitioner contends that in resentencing him the State of Alabama, acting through the circuit judge of the Circuit Court of Pike County, Alabama, failed to give him credit for prior time served on the original sentence; and he alleges, further, that the sentences resulting in his present incarceration that were imposed by the Circuit Court of Pike County in December 1964 and in May 1965, which sentences amount to over three times the aggregate sentences originally imposed in said cases, violate his constitutional rights in that said greater sentences constitute punishment for his having exercised his right to and for having been successful in a post-conviction coram nobis proceeding. Petitioner contends that it is constitutionally impermissible for the State of Alabama to deny him credit for the time served on the void sentence and to force upon him the risk—here a reality—of more severe punishment as a penalty for his having exercised his right to and for having been successful in Alabama post-conviction proceedings. Petitioner did not present either of these issues to the courts of the State of Alabama on the question of exhaustion of state remedies as a state prisoner is ordinarily required to do under 28 U. S. C. § 2254. Petitioner takes the position that his case is one of "exceptional circumstances" in that there is an absence of available state corrective processes.

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[2]Title 14, § 86, Code of Alabama (1940) (Recomp. 1958).

Upon an examination of the petition as presented, this Court, by formal order entered on July 17, 1967, held that 28 U. S. C. § 2254 did not bar the filing of petitioner's application for a writ of habeas corpus in this court. In making this determination, the Court stated:

> "Upon an examination of the petition as now presented and the excellently written argument filed in support thereof, this Court is of the opinion that petitioner is afforded no post-conviction remedies by the State of Alabama where his only contentions, in support of his claim that his present incarceration is unconstitutional, are (1) that he was not given credit on resentencing for prior time served upon sentences which were later set aside by the courts of the State of Alabama as being unconstitutional, and (2) that the sentences resulting in his present incarceration were imposed as, and serve as, punishment for his having exercised and been successful in Alabama post-conviction preceedings. In this connection, Judge Cates, speaking for the Alabama Court of Appeals in *Aaron v. State*, 192 So. 2d 456 (Nov. 29, 1966), wrote:
>
> > " 'Moreover, we do not think that Alabama affords, after motion for new trial wherein the trial judge's power over judgment is kept alive, any post conviction remedy to assert that a sentence is invalid because of a claim of excessiveness if the second sentence does not go beyond the statutory limit. Isbell v. State, 42 Ala. App. 498, 169 So. 2d 27. Our Supreme Court has failed to adopt any general rule that our remedy of coram nobis automatically assimilates all rights imposed on state trials by the Fourteenth Amendment. See Wilson, Federal Habeas Corpus and the State Court Criminal Defendant, 19 Vand. L. Rev. 741.'

> And, again, the same Judge, speaking for the same court, in March 1967 in *Ex Parte Merkes* [198 So. 2d 789, 790], reiterated the above-quoted statement from the *Aaron* case and stated further, 'We see no reason to go into what should be the rule of credit for prior time until we have to.'
>
> "The above cases, appearing to represent the law of the State of Alabama upon the questions now presented in petitioner's application, make it apparent that Title 28, § 2254 of the United States Code, does not bar the filing of petitioner's application for the writ of habeas corpus as now presented."

Accordingly, the respondent Warden of Kilby Prison was directed to show cause why the writ of habeas corpus as prayed for by the petitioner, William S. Rice, should not be issued. Upon petitioner's request, the Honorable Oakley W. Melton, Jr., Attorney at Law, Montgomery, Alabama, was appointed to represent the petitioner. The case was set for oral hearing before the Court, and now, upon the pleadings, the evidence, and the briefs and arguments of the parties, this Court proceeds to make the appropriate findings of fact and conclusions of law.

The evidence presented is uncontroverted. Petitioner's allegations as above outlined are admitted except the conclusions that he makes as to the reason for the imposition of greater sentences on being resentenced after his "successful" post-conviction proceeding. Petitioner was originally sentenced in the four cases, Nos. 6427, 6428, 6429 and 6430, on February 16, 1962. He entered upon the service of the four-year sentence imposed in No. 6427 on February 16, 1962. He continued upon the service of this four-year sentence until the

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[1]See Title 45, § § 253, 256, Code of Alabama (1940) (Decomp. 1958).

sentence was set aside by the Circuit Court of Pike County, Alabama, on August 28, 1964. Petitioner earned no statutory and industrial good time during this period of service by reason of infractions of prison rules. However, he did not lose any of the 2 years, 6 months and 12 days he had served on No. 6427 from February 16, 1962 until August 28, 1964. When petitioner was resentenced in December 1964 to ten years in case No. 6427, he was not given any credit on that sentence, nor on the other sentences imposed in Nos. 6428 and 6430, for the time he had previously served on the sentence in No. 6427 that had been declared void by the State of Alabama. As this Court stated in *Jesse Vincent Hill* v. *William C. Holman, Warden*, 255 F. Supp. 924 (1966):

> "The constitutional requirements of due process will not permit the State of Alabama to require petitioner Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit court. Petitioner Hill was entitled to have the illegal sentence vacated. This, of course, was done by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. He is also entitled to have the time he served on the erroneous sentence in case No. 91715 before it was vacated applied on the valid sentence that was imposed in that case by the Circuit Court of Jefferson County, Alabama, on September 8, 1964. This means very simply that Hill has more than served the legal sentence imposed upon him in case No. 91715. The record in this case is clear that, instead of Hill's owing the State of Alabama any additional time, the State of Alabama owes Hill for illegal incarceration for a period of between four and five years. He is due to be released immediately. Youst v. United States (5th Cir. 1945), 151 F. 2d 666; Hoffman v. United States (9th Cir. 1957), [illegible] 2d 378."

And the Fourth Circuit in *Patton* v. *North Carolina*, June 14, 1967, 35 Law Week 2737, stated:

> "It is grossly unfair for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen . . . ."

This rule of due process is applicable in this case and will not allow the State of Alabama to permit petitioner to be penalized by service in the state penitentiary because of an error the Circuit Court of Pike County made in case No. 6427. Petitioner Rice was constitutionally entitled to have the sentence imposed upon him in case No. 6427 (and also in cases Nos. 6428, 6429 and 6430) vacated. This, of course, was done by the Circuit Court of Pike County, Alabama, on August 28, 1964. He was also constitutionally entitled, upon being resentenced in case No. 6427, to be given credit for each of the days he had served upon the voided sentence that had been imposed on February 16, 1962. In addition, he was constitutionally entitled to any statutory and/or industrial good time allowance that he may have earned upon the service of the sentence in case No. 6427 from February 16, 1962 until August 28, 1964. In this connection, see *Short* v. *United States* (D.C. Cir. 1965), 344 F. 2d 550.

The second issue presented in this case concerns whether the State of Alabama, acting through the Circuit Court of Pike County, Alabama, violated petitioner Rice's constitutional rights by subjecting him to more severe punishment upon his being resentenced in cases Nos. 6427, 6428 and 6430, after the prior sentences in these cases had been declared void and set aside in a post-conviction coram nobis proceedings initiated by Rice in the state court. This Court, after considerable study, has concluded that sentence imposed by a court on retrial after post-conviction attack that is harsher than the sentence originally imposed — unless some justification

appears therefor — violates the Due Process Clause of the Constitution of the United States. *Marano v. United States* (1st Cir., March 1967), 374 F. 2d 583.

In the *Marano* case, the defendant was convicted in the United States District Court for the District of Massachusetts. Upon appeal, the First Circuit Court of Appeals ordered a new trial. *Kitchell* v. *United States*, 354 F. 2d 715 (1st Cir. 1966). On the second trial, Marano was again convicted, and upon his second conviction he was given a five-year sentence as opposed to the three-year sentence in the first case. When this issue was presented to the First Circuit Court of Appeals, it was stated:

> "As we have recently held, a defendant's right of appeal must be unfettered. Worcester v. Commissioner of Internal Revenue, 1 Cir., 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such certainty, Worcester v. Commissioner of Inland Revenue, supra, he likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing. Accord, Patton v. State of North Carolina, W.D.N. Car., 1966, 256 F. Supp. 225, 80 Harv. L. Rev. 891. But cf. Hayes v. United States, 1957, 102 U.S. App. D.C. 1, 249 F. 2d 516, 517, cert. den. 356 U.S. 914, 78 S. Ct. 672, 2 L. Ed. 2d 586. But, equally, the judge should not be permitted to change his mind by deciding that he had been too lenient the first time, as was suggested here during oral argument, or, if a new judge, by having a different approach towards sentencing. We do not approve the contrary decision in Shear v.

Boles, N.D.W. Va., 2/3/67, 263 F. Supp. 855, cited to us by the government. Such possibilities, if they had to be recognized, might well be substantial deterrents to a decision to appeal." [Footnotes omitted.]

In *Patton* v. *North Carolina*, in dealing with this question of a more severe sentence being imposed when a defendant is resentenced after post-conviction proceedings have resulted in voiding the original conviction, the Fourth Circuit stated:

"The risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress. For this reason the district court declared that predicating [defendant's] constitutional right to petition for a fair trial on the fiction that he has consented to a possibly harsher punishment, offends the Due Process Clause of the Fourteenth Amendment. * * *

"The district court held that [defendant's] punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the state must bear the burden of showing that such facts were introduced at the second trial, since 'where the record discloses no colorable reason for harsher punishment,' the effect would be to inhibit the constitutional right to seek a new trial. * * *

"We do not think, however, that defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, Marano v. U.S., 35 LW 2580, which has recently held that a sentence may not be increased following a successful appeal, even where additional testimony has been introduced at the

second trial. * * * Contra, Starner v. Russell, 35 LW 2706. * * *

> "In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial — that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the appearance of improper motivation is a disservice to the administration of justice. * * *
>
> "North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced. Thus the threat of heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the state wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have exercised the right to a fair trial. This is an arbitrary classification offensive to the Equal Protection Clause. * * *"

The *Patton* case is peculiarly applicable here from a factual standpoint. In 1960 Patton, without the aid of counsel, entered a plea of *nolo contendere* to a charge of armed robbery and was sentenced to twenty years in prison by the North Carolina state court. In 1965 Patton sought post-conviction review, and on the basis of *Gideon* v. *Wainwright*, 372 U.S. 355 (1963) (as petitioner Rice did in the Circuit Court of Pike County in this case), obtained a new trial at which time Patton was found guilty of the same offense. The judge sentenced him to

twenty years, stating, "I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served." Patton applied to the United States District Court for the Western District of North Carolina for habeas corpus, claiming that the harsher sentence was a denial of due process and equal protection. The district court held that petitioner must be released unless properly sentenced and, further, that to impose a sentence equal to that given under a previous void conviction is either to deny credit for time served under the previous sentence or to impose a longer sentence. The district court further held that to deny Patton credit for the time he had served was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as is the imposition of a harsher sentence unless the record shows some justification for it. The Fourth Circuit, in reviewing this case, did not agree with that part of the district judge's reasoning to the effect that it was constitutionally permissible to impose a harsher sentence upon retrial if some justification is shown for it. On this point, the Fourth Circuit Court of Appeals stated:

> "We are in accord with the First Circuit in Marano v. United States, 35 Law Week 280, which has recently held that a sentence may not be increased following a successful appeal even where additional testimony had been introduced at the second trial."

This Court does not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it.[1]

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[1] "Where a heavier sentence is imposed [following a 'successful' appeal] the burden is upon the state to build a record to support the imposition of harsher punishment." **Gainey v. Turner**, 266 F. Supp. 95, 103 (E. D. N. C. 1967) citing **Patton v. North Carolina**, 256 F. Supp. 225, 235 (W. D. N. C. 1966), aff'd ____ F. 2d____ (4th Cir. 1967). See also **Marano**, supra at 585, where the First Circuit held that while it is impermissible to consider evidence of aggravating circumstances arising out of evidence of the crime it is neverthless permissible to consider other facts made known to the sentencing court which would have a legitimate bearing on the imposition of sentence. "We do not

Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentences in cases Nos. 6427, 6428 and 6430 imposed on February 16, 1962 (which sentences totaled eight years to run consecutively), to a ten-year sentence in No. 6427, a ten-year sentence in No. 6428, and a five-year sentence in No. 6430, which sentences are also to run consecutively. It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold.

The basic concept of due process makes it unfair for the State of Alabama to imprison Rice in February 1962, to offer him the right to post-conviction review[1] to test and set aside constitutionally defective sentences, and then to subject him to greater punisment — three times greater than originally imposed — if he successfully exercises that right. Under the evidence in this case, the conclusion is inescapable that the State of Alabama in punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional.

An equally strong basis upon which the harsher sentences imposed by the Circuit Court of Pike County in these cases are unconstitutional is that they violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Patton* v. *North Carolina*, supra. In Ala-

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think it inappropriate for the court to take subsequent events into consideration, both good and bad." **Shear v. Boles**, 268 F. Supp. 855 (N. D. W. Va. 1967), to the extent that it holds that in cases such as this the burden is on the person attacking the second harsher sentence to show that it was motivated by impermissible factors, is rejected.

Unless the reasons for the imposition of a harsher sentence affirmatively appear of record, it cannot be presumed hat the motives which prompted the imposition of such a sentence are constitutionally permissible. Cf. **Carnley v. Cochran**, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); **Johnson v. Zerbst**, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

[1] In Alabama, this review is by writ of error coram nobis. See **Wiman v. Argo**, 308 F. 2d 674, 677-78 (5th Cir. 1962). This method of post-viction review in lieu of habeas corpus is constitutionally permissible. **Taylor v. Alabama**, 355 U. S. 252, 261, 68 S. Ct. 1415, 92 L. Ed. 1935 (1948).

bama, there can be no increase in a sentence in a criminal case after the sentence is imposed. This is a protection that is given to all convicted criminals in this state. To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and who do so successfully is unfair discrimination and does nothing except serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of appealing his conviction, or exercising his post-conviction remedies. Such a denial is constitutionally impermissible when the risk of a harsher sentence — as it is if the position of the State of Alabama is to be sustained — is borne exclusively by those who pursue their appellate rights of post-conviction remedy. Cf. *Smartt v. Avery*, 370 F. 2d 788 (6th Cir. 1967). It is basic to the theory of equal protection that the imposition of harsher treatment on prisoners solely because they successfully pursue available post-conviction remedies cannot possibly bear any rational connection with any legitimate state interest. In order to protect this constitutional right, the original sentence, which the state may no longer challenge of its own accord, must operate as a ceiling for any sentence subsequently imposed following the successful post-conviction proceeding and retrial of the accused for the same offense. This means that, in the absence of some showing of necessity or justification, the maximum sentence that could be constitutionally imposed upon petitioner Rice in state court case No. 6427 after his reconviction in December 1964, was four years and in case No. 6428, two years and in case No. 6430, two years. This Court, in the absence of some competent evidence, cannot accept the contention that the state makes in this case that case No. 6429 was nol-prossed in order to compensate petitioner for the time served on the illegal sentence imposed on February 16, 1962 in case No. 6427. On the contrary, when the illegal sentences were set aside in August 1964 — including the one entered in case No. 6429 — and the state was put to its proof, the nol-pros was entered for some reason other than a sympathetic one

toward Rice. In all probability, the answer lies in the circuit solicitor's affidavit that the state attached to its return and answer in this case, which indicates that the solicitor was "informed by the Sheriff that the owner of the service station involved in the charge in case number 6429 had left Alabama, and as I remember, resided in North Carolina." The imposition of sentences totalling three times greater than those originally imposed permits no other reasonable explanation as to the abandonment of the prosecution in case No. 6429.

In summary, the State of Alabama must give petitioner Rice credit for the time he served upon the illegal sentence imposed in February 1962 in state court case No. 6427. Additionally, the State of Alabama must give petitioner Rice credit for the time he has served to date on case No. 6427 imposed in December 1964. In this connection, Rice, as noted above, served 2 years, 6 months and 12 days on the sentence imposed in No. 6427 before that sentence was voided by the state circuit court. Since being resentenced in December 1964 in No. 6427, Rice has served an additional 1 year, 10 months and 26 days; and since being resentenced in No. 6427, he has earned 9 months and 26 days "good time." Thus, Rice has, as of August 31, 1967, actually served 4 years, 5 months and 8 days on the four-year sentence as originally imposed in No. 6427. If given credit for his "good time" — and this credit must be given* — Rice has, as of August 31, 1967, served the equivalent of 5 years, 3 months and 4 days on this four-year sentence. Rice is entitled to be released immediately from any further incarceration by reason of the sentence imposed by the Circuit Court of Pike County in state court case No. 6427. Furthermore, Rice is entitled to have credited to the two-year sentences — the maximum constitutionally valid in Nos. 6428 and 6430—the time served on No. 6427 that exceeds four years.

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*To the extent that **Newman v. Rodriguez**, 375 F. 2d 712 (10th Cir. 1967), is to the contrary, this Court declines to follow it for the reasons stated in **Hill v. Holman**, 255 F. Supp. 924 (M. D. Ala. 1966).

In accordance with the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court that the petitioner, William S. Rice, is presently illegally incarcerated by the respondent, Curtis M. Simpson, Warden of Kilby Prison, by reason of the sentence imposed by the Circuit Court of Pike County, Alabama, in state court case No. 6427 in December 1964.

It is ORDERED that William S. Rice be discharged immediately from the custody of the State of Alabama and the custody of Curtis M. Simpson as Warden of Kilby Prison, Montgomery, Alabama, which custody is or may be pursuant to the conviction and judgment of the Circuit Court of Pike County, Alabama, in state court case No. 6427 rendered and imposed in December 1964.

It is further ORDERED that the costs incurred in this proceeding be and they are hereby taxed against the respondent, for which execution may issue.

Done, this the 26th day of September, 1967.

FRANK M. JOHNSON, JR.

United States District Judge